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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 608

HOWARD J. THECKSTON and
CAROLINE THECKSTON,
Petitioners,

vs.

TRIANGLE PUBLICATIONS, INC., a Corporation of Delaware, and DENNIS M. HIGGINS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above-entitled case on July 8, 1968.

OPINIONS BELOW.

The opinion of the Supreme Court of New Jersey (Appendix B, *infra,* p. 1b), is reported in 52 N. J. 173 (1968), The opinion of the Appellate Division of the Superior Court of New Jersey, reversing Petitioners' judgments against the Respondents (Appendix B, *infra,* pp. 1b-7b), is reported in 100 N. J. Super. 452 (App. Div. 1968).

The opinion (Conclusions) of the Superior Court of New Jersey, Law (trial) Division, by Alexander C. Wood, 3rd, County Court Judge, denying motion of Respondents for a new trial (Appendix B, *infra,* pp. 7b-16b), appears in "Appendix for Appellants", (Respondents here), Vol. I, 32a-41a. Portions of the Judge's charge to the jury, relating to the *New York Times "Actual Malice" Rule* (Appendix B, *infra,* pp. 16b-36b), appear in said Appendix below, in Vol. II, pp. 542a:22 through 549a:8; 550a:19-40; 556a:23-557a:16; and in "Appendix for Respondents" (Petitioners here), pp. 32a:21 through 44a:3; 45a:9-37, pp. 60-73.

Memorandum handed to jury by trial Court stating *New York Times Actual Malice Rule* (Appendix B, *infra,* pp. 37b-38b), appears in said "Appendix for Respondents" (Petitioners here), p. 46a.

JURISDICTION.

The judgment of the Supreme Court of New Jersey (Appendix B, *infra,* p. 38b), was entered on July 8, 1968. The jurisdiction of this Court is invoked under 28 U. S. C., ¶ 1257 (3).

QUESTIONS PRESENTED.

1. Where State Appellate Court in its opinion gave the *New York Times "Actual Malice" Rule* such a rigid and narrow and improper construction that it appeared to limit liability of a newspaper to a "public official" virtually to proof of actual knowledge of falsity of defamatory statements and even down-graded that, and referred to but did not seem to apply alternative part of the rule to the evidence of reckless disregard of whether statements were false or not, and evidence was sufficient under either aspect of rule, reversal of judgment on jury verdict based on such reckless publication seems to disregard this co-equal standard of the Federal rule, in fact fore-part, too, and, therefore, should not judgment of reversal be set aside and original judgment reinstated?

2. Where the State Appellate Court only had a small part of the trial transcript in the appendix or record on appeal, was it contrary to the applicable and repeated decisions of this Court that an independent examination of the record as a whole, had to be made as the prerequisite to determine that the evidence was insufficient to justify a jury verdict for "public official" under the *New York Times Rule*?

3. Where the Petitioner was clerk of a small cause court and instituted action for libel based upon a series of publications which referred to him throughout as "a minor official"; and trial court held that he was a "public official" under *New York Times Rule* and he objected throughout the trial to such holding and also excepted to the court's charge of the rule governing the case; and there was verdict and judgment for Petitioners and Respondents here appealed, and Petitioners' brief there referred to said objections, was it error by State Court to determine that Petitioners had not challenged court's ruling and disregard same; and further, holding that Petitioner was "public official" within contemplation of *New York Times* rule?

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are set forth in Appendix A, *infra*, p. 1a.

STATEMENT OF JUDGMENT AND FEDERAL QUESTIONS.

The judgment of the Supreme Court of New Jersey, entered July 8, 1968 (Appendix B, *infra*, p. 38b), denied Petitioners' Petition for Certification to review judgment of the Appellate Division of the Superior Court of New Jersey which reversed judgment of the Superior Court, Law Division, and remanded the matter for entry of a judgment in favor of defendants (respondents here), by mandate or Judgment on Reversal entered April 25, 1968, issued May 23, 1968, Appendix B, *infra*, p. 39b.

The Federal question was raised in the Superior Court of New Jersey, Law Division, in the Appellate Division of the Superior Court, and in the Supreme Court of New Jersey. The Trial Judge ruled and tried the said action under the Federal rule, that prohibits a "public official" from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not, as held by this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 84 S. Ct. 710, 11 L. ed 2d 686, (1964).

The Federal question, constitutional right of free speech, was stated as issue in pretrial order (Appendix for appellants below, Vol. I, p. 26a:12). At the outset of the proceedings, the Court determined and ruled as a matter of law that the plaintiff "was a public official within *New York Times* and *Rosenblatt* v. *Baer,* 383 U. S. 75, 86 S. Ct. 669, (1966), (Ibid., Conclusions, 36a:14)." The Court charged that the petitioner was a "public official" and subject to the *New York Times Rule* (Ibid., Vol. II, 542a:38-545a:1). The petitioners excepted thereto. Respondents in statement of questions involved alleged complete absence of evidence within *New York Times Rule,* "Brief for Appellants" (respondents here) p. 1. Petitioners challenged in counter-statement of questions involved in "Brief of Respondents" (petitioners here), p. 1. Appellate Division reversed because of insufficiency of evidence under *Times* rule (Appendix B, *infra,* pp. 1b-7b).

Petitioners applied to Supreme Court of New Jersey and alleged in Statement of Questions Involved that Appellate Division erred (1), assuming "whole record" before it because of insufficiency of proofs to present a jury issue required by *Times* rule, (2) assuming only printed Appendix before it, it erred likewise, (3) erred in not considering and holding that petitioner, a court clerk, was a "public official" under *New York Times,* where he objected throughout trial

and excepted to ruling, and (4) erred in reversing without entire record in Appendix or record below, but only small portion and independent examination of the "whole record" as decided by the decisions of this Court (Petition for Certification, Statement of Questions Involved), Appendix B, *infra*, p. 39b-40b; Counterstatement of Questions Involved, Brief for Respondents (Petitioners here), Appendix B, *infra*, p. 40b-41b, to respondents' (Appellants below), Appendix B, *infra*, p. 41b.

("D-a"—Vol. I or II, means APPENDIX FOR APPELLANTS, Respondents here; "P-b" means BRIEF FOR RESPONDENTS, (plaintiffs), Petitioners here.)

STATEMENT OF THE CASE.

The action was for libel by Petitioner, the plaintiff, Howard J. Theckston (Clerk of the Camden County District Court), for series of libels, which plaintiff contended were not only "false and highly defamatory of him" (D 38a:38; Pb 7:22), but published with "actual malice", in sensational and inflamatory manner, subjecting him to number of investigations (in all of which he was cleared) and violent public reactions, and affecting him deeply, published by Respondents here, the defendants, Triangle Publications, Inc., (owner and publisher of THE PHILADELPHIA INQUIRER), and Dennis M. Higgins (its reporter), as a feature and heart-rending sob story about an alleged orderly behaved Puerto Rican "MOTHER OF 5 JAILED IN CAMDEN WHEN 'FREE SPEECH' IRKS AIDE" (plaintiff-court clerk), without cause, at direction of plaintiff, "a minor official", and "Her young five (who were non-existent) children were left at home with no one to feed or care for them"; and

Also action by Caroline Theckston (Clerk's wife) for loss of consortium.

Truth was neither pleaded, nor an issue. (D 18a:26a:10 Item 7.)

Plaintiffs filed complaint based upon 6 publications (Appendix C, *infra*, pp. 2c-10c, being Exhibits P1 to 6, treated jointly at trial) and by plaintiff's wife for loss of consortium.

There was a trial for 38 days over a 10-week period before County Court Judge Alexander C. Wood, III, with a jury, at Mt. Holly, resulting in jury verdicts of $60,000.00 compensatory damages for plaintiff Howard J. Theckston and $20,000.00 for plaintiff Caroline Theckston.

There was a motion by Respondents (defendants) for a new trial on the grounds that each verdict was contrary to the weight of the evidence, excessive and contrary to law, which motion was denied and Judge Wood filed *Conclusions* (opinion). (D I 32a:1; Pb 3:30-8:27) (Appendix B, *infra*, pp. 7b-16b).

There is a wide disparity between the facts as stated by the Appellate Division and the Trial Judge, which accentuates question raised about State Appellate Court examining the *"whole record"*, otherwise how account for it?

The Appellate Division said—

> "the factual misstatements are incidental and do not go to the heart of the alleged libel. The thrust of plaintiffs' complaint is that the newspaper accounts were slanted and presented an unfair picture of what really happened. Actually, we do not have so much a case of factual falsity as one of impartial reporting and fair editorial comment." (Appendix B, *infra*, p. 5b.)

However, the trial court characterizing all the voluminous testimony taken before him, said (D I 38a:5-9; or Pb 6:30-34) (Appendix B, *infra*, 13b):

> "The jury could find that there were numerous factual falsities in the oft-repeated newspaper accounts. * * * they could find falsity in the entire

recital of those facts and the characterizations of the plaintiff drawn therefrom."

(D I 38a:33-39a:1-13; or Pb 7:16-36) (Appendix B, *infra*, 14b):

"* the paper chose to present an account of the arrest of a person charged with disorderly conduct in what the jury could find was a grossly distorted manner, with the object of portraying the plaintiff as a despotic and arrogant person (to use two of defendants' own adjectival characterizations). The jury could further find that such portrayal was false and highly defamatory of the plaintiff.

"Moreover, the Court feels that there was ample evidence not only of the defamatory character of the publications, but also that they were indeed published with 'actual malice' in the *New York Times* sense. There was, to be sure, some investigation before the story was written, but it was at best desultory and haphazard. No real effort was made to check with eye witnesses other than Mrs. Agin, and no inquiry was made as to her motives although there was evidence from which it could be concluded that she was a bitter and disgruntled person who for reasons of her own was attempting to satisfy a grudge against her superior."

* * * * * *

"Clearly the jury could find that these stories, if not willfully false were published with reckless disregard of whether they were false or not." (D I 39a:33-35; or Pb 8:15-18.)

(D I 39a:36-40a:13) (Appendix B, *infra*, 15b):

"I am of course aware that the United States Supreme Court indicated in *New York Times Co.* v. *Sullivan, supra*, that a newspaper is not required to

guarantee the absolute correctness of all its facts. But this is not to say that a newspaper has no duty to check its facts or that it may ignore or even avoid obvious areas where this should be done.

"The continuing barrage of repetition of the account of the incident, which followed the initial publication, is further evidence, if that be needed, from which the jury could infer actual malice. It might well be concluded that the defendants were attempting to make a sensational story regardless of the true situation and regardless of the catastrophic effect on the reputation of the plaintiff.

• • • •

(D I 40a:34-37)

"In this case, the jury was charged as to the constitutional standard laid down in *New York Times*. The jury rendered its verdict in the light of that charge and there was evidence to support that finding."

The President of the Camden County Bar Association, Neil Deighan, Jr., in announcing investigating committee, as reported in Inquirer of October 2, 1963, said (*Ex* P-4):

" 'many of the practicing attorneys were astounded and shocked' at the disclosure of Theckston's actions.

" 'My personal reaction to the reported stories and editorial in The Inquirer is that this incident is either a gross infringement on civil rights or one of the worst and most distorted newspaper reports I have seen.' "

The basic story of the libels appeared in *Ex P-1* (Appendix C, *infra*, p. 2c), in the issue of The Philadelphia Inquirer of Monday, September 30, 1963, (one week after the event), page 1, center, with bold headline reading, *"MOTHER OF 5 JAILED IN CAMDEN WHEN 'FREE SPEECH' IRKS AIDE"*. It was not a developing or

"hot" story requiring immediate publication. It was one week after the event and "stale", with no need for immediate publication. There was ample time to interview Mrs. Buridrogo, the Puerto Rican woman. It was contended and jury could find that defendants deliberately stalled and delayed interviewing her until after publication, because it would eliminate this sensational sob story, which editors had already decided was "a very good story" before they knew the details or had even heard from defendant-reporter. (Pb 14-18.)

The investigation they conducted into arrest by their regular Camden reporter, Harry Potter, showed that when she was arrested, her "Condition" was "Drunk" and the "Charge" was "Disorderly Conduct". (*Ex P 21A;* D II 437a:4-39; 438a:1-32), (Appendix C, *infra,* p. 1c.) This was not published, nor the fact that she pleaded guilty next morning and apologized to Mr. Theckston for the trouble she caused him. In other words, defendants knew that the feature-story, in essence, was false: She was drunk and disorderly in the District Court office and she had no 5 young children, and the story as published was a fictionalized and false version of what took place.

Admittedly, "Mother of 5" was false. She was only the mother of a grown son, 21 years of age, and who was employed and supported her.

It was an emotional human-interest story and the theme was how this proud American-citizen "MOTHER OF 5" from Puerto Rico, came to the court as a self-appointed interpreter for her Spanish speaking countryman to help him with his case in District Court, how her constitutional right of "Free Speech" was shattered because of plaintiff's annoyance with the Spanish-speaking woman and her tone of voice, and that as a reward for her troubles she wound up "in jail on disorderly conduct charges pressed by a minor official with whom she quarreled. Her 5 children were left at home with no one to feed or care for them."

The story proceeds with a sub headline that the (5 children) were "LEFT WITHOUT FOOD"; that "these particular free Americans (office employees) wouldn't stand for it. They told the Inquirer of the injustice." This too is a false statement because the defendants' sole informer was the "bitter and disgruntled person who for reasons of her own was attempting to satisfy a grudge against her superior." (Pb 7:30 to 36.) She was the family friend of the defendant-reporter and the newspaper executives knew of this relationship and raised question concerning it only from the defendant-reporter involved.

The story contained the incredulous tale of an unknown City Hall operator telling the defendant-reporter on Saturday night when the switchboard was closed, about "one of the Buridrogo youngsters of 'RANSOM OFFERED' (and other subheadline) "of '$25 from the rent money' and 'can I have my mother back?' "

This was a pure fabrication, as testified to by the telephone operator and even indicated by their regular Camden reporter. (Pb 11 and 12.)

First, there were no Buridrogo youngsters: there was only the grown son of 21 years of age who was working at the time. Moreover, to show the utter irresponsibility of the newspaper in the accuracy of their reporting, by their subsequent articles even the fictitious number of children kept diminishing day by day.

There was also a reference in the story to a memorandum given by the plaintiff to the office employees, which was referred to in the story but it was contended at the trial that this was a minor part of the story, and that the main and predominating feature of the story which attracted the readers was about the jailing of this well behaved Puerto Rican woman whose only "offense" (?) was speaking in loud tone of voice and thereby annoying clerk in helping Spanish speaking countryman involved in court action, and leaving her 5 young children at home with no

one to feed or care for them. This immediately appealed to the editorial staff as "a very good story", before they knew any details about it and before they even heard from the reporter. (Pb 14-18.) The story attracted "wide public interest", manifested "by telephone calls, people calling in person and writing in, people whose comments ranged completely against Theckston in their criticism". (Pb 19:1-5.)

There was no defense of Truth.

REASONS FOR GRANTING THE WRIT.

This case is wholly unlike the other libel actions before the Court since *New York Times:* In the other cases only one article or publication was involved, while in this case a series of newspaper articles were involved almost day-in and day-out for weeks, repeating, in substance or in part with new flourishes, the first false and reckless page 1, feature story about "Jailed Mother of 5", Ex. P-1, and sharp editorial calling for investigation and discharge of the plaintiff as clerk of the court.

The Trial Judge stated,

> "The jury could find that there were numerous factual falsities in the oft-repeated newspaper accounts. But more important, they could find falsity in the entire recital of those facts and the characterizations of the plaintiff drawn therefrom. The whole thrust of the articles was to present the plaintiff to readers of the paper as an arrogant tyrant who trampled on the rights of innocent persons who had business with the court, and who wrongfully attempted to suppress legitimate criticism of his actions, whereas the jury could have found that the plaintiff did no more than to take perfectly logical action to seek the assistance of the authorities in dealing with a person who was indeed disorderly and

creating a considerable disturbance in his office." (D I, 38a:5-18.)

"There was, to be sure, some investigation before the story was written, but it was at best desultory and haphazard. No real effort was made to check with eye witnesses other than Mrs. Agin, and no inquiry was made as to her motives although there was evidence from which it could be concluded that she was a bitter and disgruntled person who for reasons of her own was attempting to satisfy a grudge against her superior." (D I, 39a:6-13.)

"The continuing barrage of repetition of the account of the incident, which followed the initial publication, is further evidence, if that be needed, from which the jury could infer actual malice. It might well be concluded that the defendants were attempting to make a sensational story regardless of the true situation and regardless of the catastrophic effect on the reputation of the plaintiff." (D I 40a:5-13.)

(Appendix B, *infra*, pp. 13b, 14b, 15b.)

Examination of the "entire trial record" would demonstrate this, the diminutive printed record may not. It is contended that even the printed record supports the Trial Court's factual findings as stated in Petitioners' Brief (designated "BRIEF FOR RESPONDENTS" before State Supreme Court and Appellate Division, pp. 10-28, coupled with "APPENDIX FOR RESPONDENTS".)

The greatly abbreviated testimony established a sufficient prima facie issue for the jury under *New York Times* of convincing clarity under the alternative part of the rule that the defamatory statements were made with reckless disregard of whether they were false or not. It seems that the State Appellate Courts misunderstood and misapplied the nature and extent of the "actual malice rule" and construed it so rigidly and narrowly that it predicated liability only

on pre-publication actual knowledge, and even that so stringent that it amounted to "absolute privilege".

In *St. Amant* v. *Thompson*, 390 U. S. 727 (1968), 88 S. Ct. 1323, 20 L. ed 2d 262, this Court reversed a plaintiff's judgment because the rule was misunderstood and applied by the State Court, and by the same token there should be a reversal where the rule was misunderstood and applied by the State Appellate Courts in reversing plaintiffs' judgments based upon jury verdicts on sufficient evidence in long trial strictly and carefully tried within the rule. And this was done without "the whole record" of the trial being before the Appellate Courts, in conflict with the rule of *Beckley Newspapers Corporation* v. *Hanks*, 389 U. S. 81, 88 S. Ct. 197 (1967), 19 L. ed 2d 248, where this Court repeatedly said that it can only be done upon "an independent examination of the record as a whole".

(Volumes I and II—"APPENDIX FOR APPELLANTS", Respondents here.)

The effects on Petitioner were devastating. Mrs. Thecksston testified that she and her husband (Petitioners) "just stopped going out (from shame and humiliation). It was just three lost years, believe me." (D I 157a:29-30.)

The decision of the State Appellate Court virtually emasculates protection of reputation and position of the lower-echelon official—the little man in the public official field—the "minor official"—(as the Respondents repeatedly referred to the Petitioner throughout the series of articles) —and subjects him to loss of position and livelihood by false defamatory and reckless statement, without the ability and capacity of public officials in higher echelons to fight back, defend and protect themselves.

The contest between Petitioner and the Respondent to save his reputation and job was one-sided—the minor court clerk against the newspaper was ill-matched: A powerful metropolitan newspaper with a daily circulation in excess of 600,000 and over a 1-million readers vs. "a minor court

clerk". The clerk was crushed in his reputation and mental suffering and has never recovered from the attacks, although ultimately exonerated by all agencies.

Despite this uneven contest, the State Appellate Courts in its said narrow and rigid overconstruction of the rule, not only reversed the judgments on the small, partial record for insufficiency of evidence, but directed final judgment to be entered for Defendant-newspaper without even remanding case for re-trial or further proceedings not inconsistent with opinions, which this Court has done in applicable cases.

The test as laid down by this Court in *New York Times* and *Beckley Newspapers Corp.* v. *Hanks,* cited by Appellate Division, and related cases, is that the Appellate Court undertakes "an independent examination of the record as a whole", which was conceded by the Respondents (defendants) (Db 17:15; 37; 18:2). The Appendix filed by Respondents (defendants) only contained a small part of the trial record to which Petitioners (plaintiffs) objected and counter-questioned that Appellate Court should therefore dismiss appeal, etc. (See Counterstatement of Questions Involved, Pb 1 (a, b, c)). (Appendix B, *infra,* pp. 40b-41b).

The Appellate Division did say in its opinion that they examined "the whole record" but the "whole record" was not before it, only the printed Appendix of Respondents (defendants), 566 pages,—and not the entire typewritten record consisting of about 4,500 pages, and *only* the diminutive printed record was before the State Supreme Court.

The "actual malice" rule in *New York Times* was considered and interpreted by this Court in *Curtis Publishing Company* v. *Butts, Associated Press v. Walker,* 388 U. S. 130, 87 S. Ct. 1975, 18 L. ed 2d 1094, decided June 12, 1967.

In *Curtis Publishing Company,* the second type of "reckless falsehood" has been clarified and somewhat delineated, and Mr. Justice Harlen joined by 3 Justices said:

"The evidence on the preparation of the article, on which we shall focus in more detail later, cast serious doubt on the adequacy of the investigation underlying the article."

The State Appellate Courts seemed to feel that even though, as found by the Trial Judge, "the newspaper's investigation of the story prior to publication (was) at best desultory and haphazard", and the newspaper failed "to inquire as to possible motive of the employee in the District Court Clerk's Office who first alerted the newspaper to the incident," and the "fact that the plaintiff was given no *bona fide* opportunity to tell his version of the story", that this did not satisfy the said test of "actual malice", and that "mere negligence" was constitutionally insufficient to show the recklessness that is required for a finding of "actual malice", under *New York Times.*

However, in *Curtis Publishing Company,* here are a few quotes of what the Justices of this court and also the Chief Justice regarded as tantamount to "reckless falsehood":

Mr. Justice Harlan said (under V):

"The *Butts* jury was instructed, in considering punitive damages, to assess 'the reliability, the nature of the sources of the defendant's information, its acceptance or rejection of the sources, and its care in checking upon assertions.' These considerations were said to be relative to a determination whether defendants had proceeded with 'wanton and reckless indifference'. In this light we consider that the jury must have decided that the investigation undertaken by the Saturday Evening Post, upon which much evidence and argument was centered, was grossly inadequate in the circumstances.

* * * * * * *

"Given the extended history of the case, the amount of evidence pointing to serious deficiencies in investigatory procedure, and the severe harm in-

flicted on Butts, we would not feel justified in ordering a retrial of the compensatory damage issue, either on the theory that this aspect of the case was submitted to the jury only under the issue of 'truth', or on the very slim possibility that the jury finding regarding punitive damages might have been based on Curtis' attitude towards Butts rather than on Curtis' conduct.

"The evidence showed that the Butts story was in no sense 'hot news' and the editors of the magazine recognized the need for a thorough investigation of the serious charges. * * *."

Mr. Chief Justice Warren, concurring in result, said (at end of opinion):

"The slipshod and sketchy investigatory techniques employed to check the veracity of the source and the inferences to be drawn from the few facts believed to be true are detailed at length in the opinion of Mr. Justice Harlan. Suffice it to say that little investigative effort was expended initially, and no additional inquiries were made even after the editors were notified by respondent and his daughter that the account to be published was absolutely untrue. Instead, the Saturday Evening Post proceeded on its reckless course with full knowledge of the harm that would likely result from publication of the article. This knowledge was signaled by the statements at the conclusion of the article that 'Wally Butts will never help any football team again' and 'careers will be ruined, that is sure'.

"I am satisfied that the evidence here discloses that degree of reckless disregard for the truth of which we spoke in *New York Times* and *Garrison*. Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers."

What Mr. Chief Justice Warren and Mr. Justice Harlan said about the Saturday Evening Post might well be applied to The Philadelphia Inquirer in this action.

It is submitted that the State Appellate Courts gave the rule a too rigid and narrow construction which appears to be contrary not only to *New York Times Co.* and *Curtis Publishing Co.* v. *Butts,* but also to the recent opinion in *St. Amant* v. *Thompson,* 390 U. S. 727, (1968) 88 S. Ct. 1323, 20 L. ed 2d 262 (1968), in which Mr. Justice White said:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified annonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

Almost prophetic was the language of the Trial Judge, Judge Wood, who pointed out in his "Conclusions" denying motion for new trial, substantially the same facts present in the case of Petitioners within said guide lines.

He wrote his Conclusions prior to April 28, 1967 (Vol. I, 42a:21), and *Butts* and *St. Amant* were decided thereafter, namely, June 12, 1967 and April 29, 1968, respectively.

The State Appellate Courts' reversal has applied the *New York Times* rule with such rigor and minimization of the disputed facts as found by the Trial Judge and Jury who heard the case, that it is urged that it has gone beyond the

boundaries laid down by this Court in this class of cases and virtually deprived "public officials" and "public figures" of libel protection and redress. See dissenting opinion of Justice Fortas, in *St. Amant* that . . .

> "The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open-season. The occupation of public officeholder does not forfeit one's membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. *New York Times* does not preclude this minimal standard of civilized living."

And this in a case where the Trial Judge tried the case strictly in accordance with the letter and spirit of the *New York Times* rule, and where he ruled on plaintiff's evidence strictly therewith, but granted defendants widest latitude as the "whole record" would show. Most of the rulings were for defendants and to such an extent they only alleged on appeal one question of evidence in this very long trial.

It also involves substantial error and unusual step by the Appellate Courts in setting aside with finality verdict of jury, with remand to enter judgment for defendants (which petitioners contend established substantial jury issue of "*New York Times* malice"), where trial court, in carefully considered opinion (D I:32a; Pb 3:32-8:27) denied motion for new trial because alleged to be contrary to evidence and weight thereof, which finality does not appear to have been ordered by United States Supreme Court in *New York Times Co.* and related cases, and even then only reversed "*on the record as a whole*" in those cases, and remanded the case for further proceedings not inconsistent with opinion.

Appellate Courts stated that plaintiffs had not "challenged the trial court's ruling that Theckston was a public official and subject to the rule enunciated in *New York Times* v. *Sullivan, supra*".

Plaintiffs objected to this ruling from the beginning through the end of this long trial (Pb 34:7-10); and also to the charge concerning same: (D II 542a:38 to 543a:27, exceptions trial transcript November 28—December 2, 1966, pages 450:18-452:18-22).

Mr. Justice Brennan in *New York Times* indicated in footnote 23 in his opinion that they had "no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. (Cit.) Nor need we here determine the boundaries of the 'official conduct' concept. * * *." Also footnote 13 in *Rosenblatt* v. *Baer*, 383 U. S. 75, 86 S. Ct. 669, 15 L. ed 2d 597 (1966).

Throughout the newspaper articles in suit, they referred to the plaintiff as "a minor official".

This, too, should have been considered by the Appellate Courts when they undertook to pass upon the sufficiency of proofs required by the *New York Times Rule* despite the abbreviated trial record to which continuous objections had been made.

The Petitioners objected when they received the abbreviated Appendix of the Respondents, as Appellants, of about 1/9th of the trial record, that this made rule of "whole record" in *New York Times* and *Beckley Newspapers* virtually inoperative. Petitioners raised the questions in Counterstatement and Brief (Pb 1, 3:1-23; 8:28 - 10:8) and therefore suggested that the Trial Court's opinion on defendants' (Respondents') motion for new trial should be considered in view thereof. Moreover, in the interest of expedition, Petitioners took position that even if the Appellate

Courts should only examine the printed appendices of both defendants and plaintiffs, they would show that there were sufficient proofs to create jury issue under and as required by the *New York Times* rule.

We referred herein to statement by Mr. Justice White as to fabrication of a story, product of imagination, doubt of veracity of informant or accuracy of his reports, etc., as evidence of the required *New York Times* actual malice, as well as the wholly shallow, and what might be termed spurious, investigation by the defendants (Respondents) of the true facts in this week-old story of a "stale nature." There were conflicts in testimony.

The Appellate Courts seemed to have considered plaintiff's note to his office employees as the paramount thing, but the record of the entire case will show that this played a minor role: It is respectfully suggested that this was the function of the jury to determine from the reading of all the publications and the testimony what was the paramount thing that readers derived from the publications, whether the false sob story was the thing or whether is was the note. It will be readily conceded that the publications constituted essentially "a sob story", and certainly there was nothing about the note to the employees that made it "a sob story."

In the cases decided by this Court where the judgment was reversed, it is suggested that it was, *inter alia,* because charge to jury was questioned, and the case was remanded to the Trial Court "for further proceedings not inconsistent with this opinion". But in this case the Appellate Courts decided with finality that the judgment be reversed and the matter remanded for entry of a judgment in favor of defendants, because as a matter of law evidence was insufficient, and this despite the fact, that the charge of the Trial Court was flawless on the Rule, there was considerable evidence of "actual malice" by recklessly false statements of conflicting character with impeccable *New York Times Rule* charge and jury after long trial and what appeared to be

careful and responsible deliberations, brought in verdicts for Plaintiffs.

This Court has stated that the outer limits of "reckless disregard" "cannot be fully encompassed" in one infallible definition. Inevitably its outer limits will be marked out by case-to-case adjudication * * *." (*St. Amant*)

The Appellate Courts take a partial statement from *Garrison* v. *Louisiana,* by Mr. Justice Brennan, that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." But Mr. Justice Brennan then stated "The use of calculated falsehood, however, would put a different cast on the Constitutional Question", and referred to the honest, but inaccurate utterance, and stated that "it does not follow that the lie, knowingly and deliberately published about a public official should enjoy a like immunity"; and about "those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant * * * * *. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protectection."

And here, it is suggested that the New Jersey Appellate Courts fell into egregious error and eliminated the alternative or 'reckless' part of the Federal rule that was laid down in *New York Times,* and reversed the judgment herein apparently on only the first part of the rule, namely, 'knowing falsehood' when it said, "where public officials are concerned, it is only a calculated falsehood which will afford redress."

Then followed a reference in opinion of State Court about what this Court said concerning fortitude of judges applying to other government officials; and cited *Beckley Newspapers Corp.* v. *Hanks,* and the Appellate Court then concluded by reversing, and remanded the matter for entry of judgment of favor of Defendants.

In other words, it is suggested that the New Jersey Appellate Courts have decided that case not in accord with the Federal Constitutional rule laid down in *New York Times* and the applicable decisions that followed, and swept away the broad area of reckless disregard of truth, which is suggested to be the major part, because of the practical and realistic difficulty in probing into the minds of the newspapermen that they actually knew that the statements were false beforehand when they composed and published same.

No where in the opinion does the Court refer to 'reckless falsity' except to mention it as part of the test of 'actual malice', as this Court stated in *New York Times,* and that the measure of proof is convincing clarity. All references to the meager facts set forth in the opinion are measured against "factual falsehoods", and are not measured against the important alternative co-equal standard of this Court, namely statement made with "reckless disregard of whether it was false or not."

Moreover, may it be pointed out that the constitutional standard established by the Court was clearly in accordance therewith and jury had it with them during deliberation in memorandum form (Appendix A, *infra,* p. 37b).

It is submitted that were it not for the misunderstanding and misapplication of the actual malice standard by the State Appellant Courts, there was a sufficiency of evidence to go to the jury on the alternative rule of reckless disregard of truth, this is substantially the only error complained of by the defendants-respondents, the decision of the New Jersey Appellate Courts should be reversed, and the judgments based upon the verdicts of the jury in the trial of Law Division should be reinstated.

The verdict for the plaintiff-petitioner was based upon our claim for damages for loss of consortium and is derivative from the claim of plaintiff husband, involves no Federal Constitutional Question and neither do her damages.

We have argued that the New Jersey Court did not consider the alternative actual malice reckless disregard rule. Even if we are wrong in this, we contend that the decision calls for re-examination and reversal because the reversal by the New Jersey Court was not based upon the examination of the trial record as a whole as laid down in the decisions of this Court, namely: *New York Times Co.* v. *Sullivan, Garrison* v. *Louisiana, Curtis Pub. Co.* v. *Butts, Associated Press* v. *Walker, Beckley Newspapers Corp.* v. *Hanks,* and *St. Amant* v. *Thompson.*

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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